No. 94-1942

Supreme Court, U.S.
FILED
AUG 07 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Of Counsel:

Anne B. Carroll
Marc J. Heimowitz
Cahill Gordon & Reindel
(a partnership including a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Andrew G. Fusco
Thomas H. Newbraugh
Jeffrey A. Ray
Fusco & Newbraugh, L.C.
2400 Cranberry Square
Morgantown, West Virginia 26505
(304) 594-1000

Attorneys for Petitioners

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

BEST AVAILABLE COPY

12 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

CONCLUSION 8

TABLE OF AUTHORITIES

Cases	PAGE
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993), *rev'g* 936 F.2d 586 (11th Cir. 1991)	7
Dewey v. City of Des Moines, 173 U.S. 13 (1899)	3-4
Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), *rev'g* 916 F.2d 718 (10th Cir. 1990)	7
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	*passim*
Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541 (4th Cir. 1994)	5n
Illinois v. Gates, 462 U.S. 213 (1983)	4
Lastimosa v. Hughes Aircraft Co., 486 U.S. 1050 (1988), *vacating*, 823 F.2d 1552 (9th Cir. 1987)	7
Lebron v. National Railroad Passenger Corp., 115 S.Ct. 961 (1995)	3
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	2, 2n
Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977)	2n-3n
Smith v. United States, 502 U.S. 1017 (1991)	7
United States v. Williams, 504 U.S. 36 (1992)	3n
Willoughby v. Central Illinois Light Co., 486 U.S. 1049 (1988), *vacating* 826 F.2d 1067 (7th Cir. 1987)	7
Yee v. City of Escondido, 503 U.S. 519 (1992)	3, 4

PAGE

Constitutional Provisions

U.S. Const. Amend. I..... *passim*

Court Rules

4th Cir. Rule 36.4 ..... 6n

4th Cir. Rule 36.6 ..... 7n

7th Cir. Rule 53(b) 7n

9th Cir. Rule 36-3 ..... 7n

10th Cir. Rule 36.3 ..... 7n

11th Cir. Rule 36-2 ..... 7n

U.S. Sup. Ct. Rule 10.1 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1942

STEPHEN MCKNIGHT, in his capacity as personal representative of the estate of ROY MCKNIGHT, and MYLAN PHARMACEUTICALS, INCORPORATED, a West Virginia corporation,

Petitioners,

—v.—

AMERICAN CYANAMID COMPANY, a Maine corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

In its opposition brief, respondent American Cyanamid Company simply does not come to grips with the central reason urged by petitioners why certiorari should be granted in this case: that this Court has never articulated standards for determining when a *corporate* defamation plaintiff is properly deemed a public figure under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). As a result, the law in this area is marked by intense conflict and confusion in both the lower federal courts and the state courts. Indeed, not until the final third of its brief does Cyanamid even acknowledge that the corporate status of a defamation plaintiff has anything at all to do with the issue presented for the Court's review. Respondent's Brief in

Opposition ("Resp. Br.") at 21. Yet, as set out in more detail below, even then Cyanamid does little more than assert that the conflicts identified by petitioners are "isolated cases" which do not reflect any "deviat[ion] from *Gertz* in result" and that the very different analyses applied by various courts "are in fact only differences in emphasis arising out of particularized, fact-bound inquiries in each case." Resp. Br. at 21, 27. To the contrary, as the petition demonstrates, the confusion among lower courts on this issue is anything but isolated; it is widespread, indisputably real, and the direct result of the absence of guidance from this Court as to the relevance of the corporate status of a defamation plaintiff.

Respondent's effort to evade the core question presented by this case is at the root of its argument that the issue of whether Cyanamid is an all-purpose (as opposed to limited-purpose) public figure was not " 'pressed or passed upon below' " and thus may not be considered by this Court. Resp. Br. at 7. There is, of course, no question that petitioners consistently took the position below that because American Cyanamid is a public figure, petitioners should be accorded the protection of the *New York Times* "actual malice" standard of liability.[1] Even apart from the fact that the argument that Cyanamid is a public figure under an all-purpose, as well as a limited-purpose, analysis *was* pressed in the Court of Appeals and at least implicitly passed upon in the District Court,[2] petitioners may advance here any alternative

---

[1] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *see also Gertz, supra*, 418 U.S. at 342 (The *Sullivan* "actual malice" standard protects speech about those who are public figures "by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention.")

[2] Petitioners' arguments below unquestionably focused on the limited public figure analysis. Nonetheless, as Cyanamid necessarily concedes, McKnight and Mylan contended in their brief to the Fourth Circuit that their reliance on the limited public figure argument "does not foreclose the possibility that Cyanamid is an all-purpose public figure." Opening and Answering Brief of Appellees at 49 n.30 (citing *Reliance*

legal ground to support their position that Cyanamid is a public figure. This principle was strongly reaffirmed by this Court just months ago in *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961 (1995). There, a plaintiff alleging that Amtrak had infringed his First Amendment rights did not, until his brief on the merits to this Court, assert that Amtrak was a governmental entity; indeed, he had expressly disavowed that position in the courts below. *Id.* at 964. In determining that the question of Amtrak's status was nonetheless properly before it, this Court stated:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." . . . Lebron's contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment.

Id. at 965 (citations omitted); *accord Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992); *Dewey v. City of Des Moines*,

---

Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977)). What purpose would such a statement serve except to offer the all-purpose public figure argument as an alternative for affirming the District Court's adoption of the *Sullivan* standard? The fact that the Court of Appeals did not reach the issue is not dispositive upon this question. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (the " 'not pressed or passed upon below' " rule "operates (as it is phrased) in the disjunctive").

Moreover, the District Court made factual findings as to a number of characteristics of Cyanamid wholly consistent with all-purpose public figure status, including its size, its publicly-held nature, and its "considerable access to the general and financial media." Petition at 43a. The District Court discussed, as well, the "special problems [that] arise" in determining the public figure status of corporations—including that they "have no 'reputational interest' or 'feelings' " and that they are "often 'pervasively visible and powerful economic, political and social forces in American life.' " Petition at 44a-45a. Such factors apply equally to all-purpose and limited-purpose corporate public figures.

173 U.S. 193, 198 (1899); *see also Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (" '[I]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.' "). So, too, in this case: McKnight and Mylan have urged at every turn that because Cyanamid is a public figure, they should receive the protection of the actual malice standard of liability; they may therefore, as this Court has held, "formulate[ ] any argument they like[ ] in support of that claim here." *Yee*, *supra*, 503 U.S. at 535.

It is telling, moreover, that Cyanamid does not (and cannot) dispute the trial record and public record facts about itself set out in the petition which, we submit, are *alone* sufficient to support a determination of all-purpose public figure status under *Gertz*—for example, that Cyanamid is a multi-billion-dollar company, with tens of thousands of employees and tens of thousands of shareholders; that it is a leading producer nationally in a variety of product fields, including pharmaceuticals; and that it spends enormous sums of money in advertising and promotion. Petition at 17 & n.7; *see also id.* at 43a-46a (District Court findings with respect to the very characteristics of Cyanamid which *Gertz* associates with all-purpose public figure status). Petitioners are entirely content to rest upon the record presented in the petition; Cyanamid's contention that the record is " 'very likely to be inadequate' " to demonstrate its all-purpose public figure status, Resp. Br. at 8, cannot be credited.

More importantly, as the petition demonstrates, the *central* issue raised by McKnight and Mylan—the disarray in the law concerning the significance of a defamation plaintiff's corporate status—affects with equal force both limited-purpose

and all-purpose public figure analyses by lower courts. *See* Petition at 9-16 (setting forth the inconsistencies in courts' analyses and results in both limited-purpose and all-purpose public figure cases involving corporate plaintiffs). The resolution of this conflict itself justifies plenary review by this Court.[3]

Cyanamid's efforts to rationalize away the confusion and inconsistencies that have plagued the lower courts with respect to the public figure status of corporate defamation plaintiffs are unavailing. In essence, Cyanamid resorts to the argument that because courts employ a fact-specific analysis in determining public figure status, there is no "genuine conflict in principle" among them. Resp. Br. at 21. It does not begin to suffice, however, to maintain that all courts have agreed to consider "facts" in determining public figure status; the real issues are which facts and circumstances the courts should consider when the defamation plaintiff is a corporation, and how much weight they should give to those facts and circumstances. Neither *Gertz* nor any other decision of this Court provides guidance on these questions.

Cyanamid also ignores the reality that across various jurisdictions courts have not only arrived at plainly conflicting determinations of corporate public figure status but have employed disparate criteria in reaching their results—often after explicitly noting the absence of direction from this Court

---

[3] Although Cyanamid devotes much of its brief in opposition to justifying the rationale underlying the Fourth Circuit's determination that it is a private figure, *see* Resp. Br. at 11-21, it does so wholly without reference to its own status and characteristics as a corporation and thus without addressing the core issue presented by the petition. Similarly, Cyanamid's extended discussion of *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541 (4th Cir. 1994), Resp. Br. at 11-13, misses the mark because the defamation plaintiffs in that case were natural persons, not corporations. Cyanamid's argument that *Foretich* conclusively demonstrates that the Fourth Circuit was correct in this case is, we submit, without merit. More to the point, the argument provides no basis for denying the writ.

on the issue of when or whether a corporation is a public or private figure. *See* Petition at 11-16. Cyanamid asserts that these inconsistencies owe only to "differences in emphasis arising out of particularized, fact-bound inquiries." Resp. Br. at 27. But differences in emphases and facts hardly explain the fundamental disagreements among courts on such key questions—not addressed by *Gertz*—as whether corporations should be treated for purposes of the public figure determination at all differently from natural persons and whether the nature of a corporation's business, its publicly or privately held character or the level of its self-promotion exerts any impact on the analysis at all. *See* Petition at 12-16. In short, the only "underlying doctrinal consistency among cases" in this area, Resp. Br. at 22, is the repeated and explicit judicial acknowledgment that the disorderly case law leaves the courts with few if any reliable touchstones.

Finally, Cyanamid gives great weight to the fact that the Court of Appeals decision below was unpublished, suggesting that because the panel which authored it chose not to have it published—and because the Fourth Circuit's Rules disfavor citation of unpublished opinions as precedent—this Court should deem the decision unworthy of its consideration. Resp. Br. at 9-11. Petitioners are aware of no basis in this Court's Rules or its practice for such an assertion.[4] This Court is not, of course, bound by any lower court's view of the legal

---

[4] Cyanamid appears to suggest, through its citation of the Fourth Circuit's Rule 36.4, that the Fourth Circuit itself regarded its decision in this case to be consonant with both its own prior decisions and with decisions of other Circuit Courts of Appeals. Resp. Br. at 10-11. We do not dispute the former; as the petition sets out, the Fourth Circuit (like some other courts) has consistently given the strictest possible interpretation to the nexus requirement in limited public figure analysis. Petition at 26-27. But as the petition also demonstrates, the Fourth Circuit's interpretation of the nexus requirement conflicts with that of at least three other Courts of Appeals. *Id.* at 26-27 & n.21. In any case, however, the circuit split on the nexus issue, while significant and independently certworthy, is secondary to the larger question presented by McKnight's and Mylan's petition.

significance of its own decisions. Indeed, review of an unpublished disposition recently resulted in one of the Court's most significant decisions regarding the First Amendment's free exercise clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), *rev'g* 936 F.2d 586 (11th Cir. 1991) (unpublished decision); *see also, e.g., Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), *rev'g* 916 F.2d 718 (10th Cir. 1990) (unpublished decision); *Willoughby v. Central Illinois Light Co.*, 486 U.S. 1049 (1988), *vacating* 826 F.2d 1067 (7th Cir. 1987) (unpublished decision); *Lastimosa v. Hughes Aircraft Co.*, 486 U.S. 1050 (1988), *vacating* 823 F.2d 1552 (9th Cir. 1987) (unpublished decision).[5]

As Justice Blackmun commented in a dissent to denial of certiorari that was joined by Justices O'Connor and Souter, "The fact that [a] Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting to denial of certiorari). The considerations, such as those enumerated in this Court's Rule 10.1, which genuinely *do* guide the grant of writs of certiorari militate in favor of such a grant here. As petitioners have demonstrated, and respondent has failed to refute, this case presents a federal constitutional question of special importance which is a continuing source of conflicting decisions in the state and lower federal courts and which, as both judges and scholarly commentators have repeatedly pointed out, is urgently in need of resolution by this Court.

---

[5] These cases arose from Courts of Appeals which take an even dimmer view of the precedential value of unpublished dispositions than does the Fourth Circuit. *Compare* 4th Cir. R. 36.6 *with* 7th Cir. R. 53(b); 9th Cir. R. 36-3; 10th Cir. R. 36.3; 11th Cir. R. 36-2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 8, 1995

Respectfully submitted,

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

Of Counsel:

Anne B. Carroll
Marc J. Heimowitz
Cahill Gordon & Reindel
(a partnership including a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

Andrew G. Fusco
Thomas H. Newbraugh
Jeffrey A. Ray
Fusco & Newbraugh, L.C.
2400 Cranberry Square
Morgantown, West Virginia 26505
(304) 594-1000

Attorneys for Petitioners